SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-94

EDDIE MACIEO BREWER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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EDDIE MACIEO BREWER,

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Eddie Macieo Brewer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 16, 1975.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 16, 1975. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

Where the case against a defendant is based substantially upon the uncorroborated testimony of an accomplice, whether in order to convict, the jury must believe the testimony of that accomplice beyond a reasonable doubt. And whether under *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127 (1964), the jury should consider whether they would be willing to act upon that testimony in the more serious and important matters of their personal affairs.

Also, whether it is a violation of due process for a trial court to deny counsel an argument during closing statement bearing directly on the credibility and purpose of the chief government witness.

Constitutional Provision Involved.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Statement of the Case.

Appellant was charged by Indictment No. CR 74-11[illegible] filed on July 31, 1974, in the United States District Court, Central District of California. The indictment contained four counts: Count I in which appellant was charged with violation of 21 U.S.C. §846, having knowingly conspired to distribute a Schedule I controlled substance, to wit, heroin; Count II with violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, having

knowingly and intentionally possessed with intent to distribute a Schedule I controlled substance, to wit, heroin; Count III with violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, having knowingly and intentionally distributed a Schedule I controlled substance, to wit, heroin; Count IV with violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, having aided and abetted the distribution of a Schedule I controlled substance, to wit, heroin.

On May 10, 1974, appellant was arraigned and pleaded not guilty to Counts I through IV. Also on May 10, 1974, bail was set at $3,500.00.

From November 13, 1974, to November 15, 1974, trial by jury was had, and a verdict of guilty on all four counts was filed November 15, 1974. Judgment and commitment was entered on December 6, 1974, providing for imprisonment for a period of ten years to be followed by three years of special parole to apply concurrently upon all counts.

The Court of Appeals for the Ninth Circuit affirmed the district court's decision on June 16, 1975, in a consolidated appeal between the appellant, Eddie Brewer and a codefendant.

Statement of Facts.

In the case at bar, during closing arguments, the appellant's attorney, in referring to the credibility of the unsupported testimony of the accomplice, Casteel, asked:

> "Would you base decision on the highest levels of your own personal affairs on the credibility

> and on the testimony of a man like CASTEEL? In other words, when you make investments in stocks, would you decide to move, change positions, change jobs, marry, divorce—the highest level of your own personal decisions—would you make those kinds of decisions on the word or the information or a tip or the testimony from a MR. CASTEEL?" [R.T. p. 397:18-25; p. 98:1-3.]

The Court, in its response to that portion of the attorney's closing argument, instructed the jury as follows:

> "MR. MINKIN made the statement that unless you believe that CASTEEL was the kind of person that you would trust with your daughter or your wife or from whom you would get investment advice, or *with respect to whom you would accept advice on important decisions in your lives you couldn't believe him* . . . let me tell you now *that is not the law.*" [R.T. p. 426:21-25; p. 427:1-3.] (Emphasis added.)

The Court went on to state:

> "Please, do not carry with you the idea that a Government witness must be the kind of person that was described yesterday in one of the summations." [R.T. p. 428, lines 21-23.]

The Court further sustained an objection to an argument made by counsel for appellant Brewer. The argument, as quoted from the transcript is as follows:

> "Mr. Johnson admitted to you that the statement was insufficient to involve the other people in this case that was made on May 9th. Now, on May 14th, a complete statement is taken from

Mr. Casteel and there he talks about both of the defendants now before you and later on he then testifies before a Federal Grand Jury, and, as you will note when the indictment is taken into the jury room, the Federal Grand Jury testimony was on the 24th. This case was indicted on the 27th of July. They had no case, that is, the Government had no case, and Mr. Casteel knew they had no case against either one of these defendants, I would respectfully submit, unless he were the one to testify against them. Now you sat here in this trial—

MR. LYNCH: Pardon me, objection, your Honor. It is far beyond anything that is in evidence.

THE COURT: Yes. I don't think that you are entitled to make that argument, Mr. Minkin. It is not based upon any evidence whatsoever, and I will instruct the jury to disregard it.

MR. MINKIN: All right. I will not quarrel with the Court, but I would take exception to the Court's ruling. If feel that it is a perfectly proper argument and I don't see where it is not within the scope of the evidence in this case." [R.T. 391:1-23.]

REASONS FOR GRANTING THE WRIT.

1. Prejudicial Error Was Committed by Instructing the Jury That in Weighing the Unsupported Testimony of an Accomplice, the Jury Should Not Consider Whether They Would Be Willing to Act on It in the More Serious and Important Matters of Their Personal Affairs.

The appellant contends that in order to find a defendant guilty beyond a reasonable doubt, where the evidence rests upon the unsupported testimony of an accomplice, the jury must also find that they believe that accomplice beyond a "reasonable doubt". And it is submitted that because "reasonable doubt" is equivalent to the kind of doubt one might consider in the more important decisions of personal affairs, the attorney was correct in his statements to the jury and the court in instructing the jury that such was not the law, committed prejudicial error.

In Federal Jury Practice and Instructions, Devitt and Blackman, 1970, §12.04, the following instruction regarding the unsupported testimony of an accomplice is given:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, *unless you believe that unsupported testimony beyond a reasonable doubt.* (Emphasis added.)

Although the Court is not obligated to give any specific instruction from such a source, it certainly is more than a ". . . Sears, Roebuck Catalog," as described by the Court. [R.T. p. 414, line 25.] It is submitted that the above stated instruction is an accurate statement of the legal requirement that a jury is to weigh the unsupported testimony of an accomplice with great caution and skepticism.

See

Gulley v. United States, 319 F.2d 77, 80 (6th (Cir. 1963), cert. denied 375 U.S. 942 (1964);

Cf.: On Lee v. United States, 343 U.S. 747, 757 (1952);

Caminetti v. United States, 242 U.S. 470, 495 (1917);

Holmgren v. United States, 217 U.S. 509, 523-524 (1910);

Coronado v. United States, 390 F.2d 16 (9th Cir. 1968);

United States v. Marks, 368 F.2d 566 (2nd Cir. 1966), cert. denied 386 U.S. 933 (1967);

Williamson v. United States, 365 F.2d 12, 14 (5th Cir. 1966);

United States v. Hoffa, 349 F.2d 20, 53 (6th Cir. 1965), reh. denied 386 U.S. 940, 951, 87 S.Ct. 970, 971, 17 L.Ed.2d 880 (1967);

United States v. Harris, 346 F.2d 182, 184 (4th Cir. 1965).

The appellant concedes that where an accomplice's testimony is corroborated by other evidence, the jury would not be required to believe his testimony and credibility beyond a reasonable doubt. However, where a finding of guilt beyond a reasonable doubt would rest entirely upon the unsupported testimony of an accomplice, it must logically follow that the credibility of such an accomplice's testimony must also be believed beyond a reasonable doubt. This is clearly true in the case at bar. As the Court stated, "[N]ow, I might say to you right here and now that if you reject all of Casteel's testimony the Government's case cannot stand." [R.T. p. 425, line 25, p. 426, lines 1-2.] An entire reading of the transcript would also support this statement.

The next question then is what is "reasonable doubt?" Needless to say, it has long been recognized that there cannot be a precise definition of that standard of proof. However, the Court's have ruled that various definitions of "reasonable doubt" are acceptable or unacceptable equivalents. In *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127 (1964), a trial court's charge to the jury that reasonable doubt is ". . . the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." The Supreme Court held that although reasonable doubt might be better defined, ". . . we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some."

Therefore, at the case at bar, the statements of the appellant's attorney, referring to the credibility of the unsupported testimony of the accomplice Casteel in terms of a "decision on the highest levels of your own

personal affairs . . .", although perhaps it may have been more properly phrased, was not misleading and was an accurate reflection of the standard of proof in view of *Holland v. United States.*

On the other hand, the court by directly instructing the jury to disregard the attorney's closing arguments on this point as "—not the law" [R.T. p. 426, lines 21-25; p. 427, lines 1-3], served to mislead the jury on the correct standard of proof to apply to the credibility of the testimony of the accomplice Casteel. Jury instructions, especially those relating to the degree of proof necessary to convict, are much too critical to be improperly phrased. Therefore, where the possibility exists that the jury was misled by the Court's statements, the conviction should not be allowed to stand.

2. The Trial Court Abused Its Discretion by Denying Counsel an Argument in the Closing Statement Which Bore Directly on the Credibility and Purpose of the Chief Government Witness.

It is settled under numerous federal decisions that when arguments of counsel are confined to the issues of the case and the evidence and reasonable inferences therefrom, such arguments are not to be too narrowly limited.

United States v. Lawson, 483 F.2d 535 (8th Cir. 1973);

Wakaksan v. United States, 367 F.2d 639 (8th Cir. 1966), cert. denied 386 U.S. 994, 87 S.Ct. 1312 (1967);

United States v. Quinn, 467 F.2d 624 (8th Cir. 1972);

United States v. Scalia, 464 F.2d 1301 (3rd Cir. 1972).

It has also been stated by the court in *United States v. DeAngelis*, 490 F.2d 1004, 1008 (2nd Cir. 1974) that "it is the accepted and proper purpose of summation to make arguments regarding the purpose and credibility of any witness so long as there is sufficient support in the record before the jury."

The latitude extended in counsel in closing summations to the jury has been found to include not only the evidence that has been introduced, but also any such inferences which can be reasonably drawn therefrom.

Luttrell v. United States, 370 F.2d 462 (1963);
United States v. Lawson, 483 F.2d 535 (8th Cir. 1973);
United States v. Quinn, 467 F.2d 624 (8th Cir. 1972).

Appellees contended that defense counsel's argument went beyond anything in evidence. Yet, upon an examination of the record, the argument clearly rests upon either evidence contained in the case or reasonable inferences drawn therefrom.

The statement concerning Agent Johnson's admission of insufficiency of the May 9 statement by Casteel was directly contained in the transcript, as was the evidence that Casteel made another statement on May 14 implicating the appellant. Both these statements by Casteel were offered into evidence and marked Exhibits A and B.

Reference in counsel's argument to Casteel testifying as a Federal Grand Jury indictment is clearly based upon evidence in the case. Not only was Casteel shown during the trial to have testified before the Grand Jury specifically on July 24, but such Grand Jury testimony

was directly used in the trial by counsel for codefendant Mathews in impeaching Casteel's testimony.

The final sentence of counsel's argument is nothing more than a "legitimate inference" drawn from the evidence of Casteel's role as a witness, Agent Johnson's concern over the sufficiency of evidence and the testimony of Casteel before the Federal Grand Jury. Counsel sought in this argument to show the important role of Casteel's testimony, a part without which the Government's case against appellant Brewer would have been dramatically unsuccessful. As the court stated in *United States v. Lawson, supra* at p. 537, "When confined to the evidence or reasonable inferences, arguments of counsel are not to be too narrowly limited." It is a reasonable inference from the evidence that Casteel was more than just useful to the Government's case against appellant Brewer. Casteel's testimony was essential as it was the central strength and focus of the Government's case. Without the jury believing Casteel, there could only be a verdict of acquittal. This inference can hardly be considered unreasonable; the judge himself in instructing the jury came to much the same conclusion. "I might say to you right here and now that if you reject all of Casteel's testimony, the Government's case cannot stand. . . ."

The importance of this abuse of discretion by the Court is that the jury was instructed to disregard counsel's legitimate argument concerning Casteel's testimony and his value to the Government's case.

The effect of the judge's ruling was to ultimately confuse the jury both as to the state of the evidence and also Casteel's importance in the trial. Since the majority of the argument was no more than a summary

of evidence and the remainder a reasonable inference drawn therefrom, the jury was left with a conflicting and confused version of what constituted the evidence in the case.

In addition to confusing the jury, the judge's ruling also disallowed defense counsel to emphasize the tremendous role Casteel's testimony played in the trial and possible purposes and motives which prompted Casteel to become a Government witness. Since Casteel was the main witness for the prosecution, the outcome of the trial depended on the credibility of his testimony. It was prejudicial error for the trial court judge to so confuse the jury's appreciation of the evidence surrounding Casteel's decision to testify for the Government. In a case such as this where the verdict rests so heavily upon circumstantial evidence and the testimony of an alleged accomplice, it is imperative that the jury not be misled as to the proper state of the evidence regarding such a witness. Such an incisive and incorrect ruling by the judge in the middle of defense counsel's closing argument not only prejudiced the jury concerning the credibility of Casteel's testimony, but also irreparably confused the jury as to the state of the evidence. Such abuse of discretion by the trial court judge has resulted in prejudicial error which has proved fatal to validity of the verdict rendered herein.

Conclusion.

In view of the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

RON MINKIN,
Attorney at Law,
Attorney for Petitioner.

APPENDIX A.

Memorandum.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Eddie Macieo Brewer, Defendant-Appellant. No. 75-1107.

United States of America, Plaintiff-Appellee, v. Pete Mathews, Defendant-Appellant. No. 75-1009.

Appeal from the United States District Court for the Central District of California.

Before: WRIGHT and SNEED, Circuit Judges, and POWELL, District Judge.*

Both appellants in these consolidated appeals were convicted on four counts related to the possession and distribution of heroin. We affirm the convictions.

THE BREWER APPEAL

This appellant argues that there was error with respect to two incidents occurring during the course of his counsel's argument to the jury. In attacking the credibility of an accomplice, counsel inquired of the jurors whether they would entrust personal decisions, as in changing jobs, marrying and divorce, to "a man like Casteel."

Thereafter the district judge admonished the jury:

> Please, do not carry with you the idea that a Government witness must be the kind of person that was described yesterday in one of the summations."

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*Senior District Judge, Eastern District of Washington.

There was no error in the judge's statement. Nor was there error in the instruction to the jury to disregard a statement by defense counsel that, after indictment, the government "had no case, that is, the government had no case, and Mr. Casteel knew they had no case against either one of these defendants, I would respectfully submit, unless he were the one to testify against them."

There was no support in the evidence for the remark, and the jury was properly instructed to disregard it.

THE MATHEWS APPEAL

Mathews raises three issues: (a) jury misconduct, (b) undue restriction on defendant's right to cross-examine a government witness, and (c) failure to suppress a paper found in the defendant's apartment.

The trial judge denied a mistrial after he was informed that two jurors had discussed the case during a recess. All jurors were questioned by the court. It was determined that one juror had said to another, as they left the courtroom, "I heard her testify, but I don't understand it." The court considered this incident to be only minor misconduct and we agree. With reference to juror misconduct in criminal causes, we have said:

> The denial of a motion for a mistrial rests within the sound discretion of the trial court and can be held to be error only if it amounts to a clear abuse of that discretion.
>
> *United States v. Carlson*, 423 F.2d 431, 439 (9th Cir. 1970).

The defense counsel had cross-examined Casteel, a government witness, and the prosecution had rested.

The court denied a motion for judgment of acquittal. Defense counsel then advised the court that he had just learned that Casteel had been indicted in another state on a charge related to a stolen credit card and had forfeited bond. The record does not show that counsel made a motion to reopen cross-examination for purpose of impeachment. But, assuming that was the intent, the court properly denied the request.

The indictment had not yet resulted in a conviction. This court has held to be inadmissible for impeachment purposes evidence of acts of misconduct or of arrests which do not result in conviction. *Ramirez v. United States,* 294 F.2d 277 (9th Cir. 1961). If Casteel had forfeited his own money and not that of a bondsman, there was no deceit and the forfeiture does not demonstrate dishonesty, if that was the purpose of further cross-examination.

In any event, and especially since counsel did not state the purpose for his request, to pursue this line of inquiry would bring in too many collateral issues. The value of the information for impeachment was outweighed by probable prejudicial effects and additional time required by reopening, and the district judge was in the exercise of his discretion in denying the application.

Following the arrest of Mathews, government agents went to an apartment, identified themselves to a woman who admitted them, and observed a piece of paper containing some numbers. The item was taken by one of the agents although he doubted that it had much connection with the investigation. Defense counsel objected when the item was offered in evidence and moved to suppress, which was denied.

Mathews argues that the apartment was his and that the woman could not give valid consent to enter or to search. A warrant should have been obtained and the entry and search were illegal without it. But the error was harmless. The paper was not identified as being in Mathews' handwriting and no fingerprint analysis was made. He denied any knowledge of it but thought the writing was the woman's. The connection between the exhibit and Mathews was tenuous at best and any error in admitting the item was harmless.

The evidence of guilt was overwhelming as to both defendants. Both convictions are affirmed.